

NATIONAL LABOR RELATIONS BOARD

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KIPP ACADEMY CHARTER SCHOOL,

Employer,

**Case No. 02-RD-191760**

and

NICOLE MANGIERE and CHRISTOPHER DIAZ,

Petitioners,

and

UNITED FEDERATION OF TEACHERS,  
LOCAL 2, AFT, AFL-CIO,

Union.

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**REQUEST FOR REVIEW OF THE REGIONAL  
DIRECTOR'S AUGUST 24, 2018 DECISION AND  
DIRECTION OF ELECTION BY THE UNITED  
FEDERATION OF TEACHERS, LOCAL 2, AFT,  
AFL-CIO**

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## PRELIMINARY STATEMENT

The United Federation of Teachers, Local 2, AFT, AFL-CIO (“UFT”) submits this Request for Review of the August 24, 2018 Decision and Direction of Election (“Decision”) issued by Regional Director John J. Walsh Jr. of Region 2 of the National Labor Relations Board (“NLRB” or Board”). In the Decision, the Regional Director correctly determined that KIPP Academy Charter School (“KIPP”) is a conversion charter school created pursuant to the New York State Charter Schools Act of 1998 (“Charter Schools Act”). Accordingly, the Regional Director was required to find as a matter of law that KIPP is a political subdivision of New York State pursuant to the Supreme Court’s decision in *NLRB v. Natural Gas Utility District of Hawkins County* (“*Hawkins County*”), 402 U.S. 600 (1971). Instead, however, the Regional Director misapplied the Board’s decision in *Hyde Leadership Charter School – Brooklyn* (“*Hyde Leadership*”), 364 NLRB No. 88 (2016) a case involving a non-conversion charter school, and asserted jurisdiction over KIPP. In doing so, the Regional Director improperly found that KIPP’s establishment “was in all material respects, identical to the founding of the school analyzed in *Hyde Leadership*.” Decision at 7.

Far from being identical, the manner in which conversion charter schools are established in New York is wholly different from the manner in which non-conversion charter schools are established. And unlike non-conversion charter schools, conversion charter schools are political subdivisions of the state under the *Hawkins County* test. As such, the Board is without jurisdiction over KIPP and a review of the Decision is warranted as the Decision departs from officially reported Board precedent.

However, even if the Board finds it could exercise jurisdiction in this matter, the UFT requests review of the Decision to determine whether the Board should decline jurisdiction over conversion charter schools established in New York on public policy grounds. The Charter Schools Act mandates that teachers employed by conversion charter schools remain in the same bargaining unit of teachers employed by the local school district. Since KIPP's conversion 18 years ago, KIPP teachers have been represented by the UFT and are members of the bargaining unit of all teachers employed by the Board of Education of the City School District of the City of New York ("District" or "NYC DOE"). Here, even if the NLRB finds it could exercise jurisdiction over KIPP, it should decline to assert jurisdiction in this instance, in order to maintain labor stability and effectuate the purposes of the National Labor Relations Act (the "Act").

## **STATEMENT OF FACTS**

### **KIPP's Establishment as a Conversion Charter School**

In New York, the Charter Schools Act sets forth the statutory framework providing for the establishment and operation of charter schools. *See* Education Law § 2850 *et. seq.* Under the law, a charter school may be established through two separate and distinct paths. First, an individual may seek to establish a charter school as a "standalone, independent entity." *See* Decision at 3; *Hyde Leadership*, 364 NLRB No. 88 (2016). In addition, the law permits an existing public school to convert to a charter school in accordance with the procedures set forth in the Charter Schools Act. *See* Education Law § 2851(3)(c). These schools are commonly referred to as conversion charter schools. KIPP is a conversion charter school. *See* Decision at 7 n.14 ("The uncontroverted record evidence, however, shows that Levin applied for, and was granted

a charter to operate a conversion school. Accordingly, I find that KIPP Academy is, and always has been, a conversion school under New York law.”); *see also Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB ¶ 3013 (2012).

David Levin, a teacher at P.S. 156, a traditional public school operated by the NYC DOE, applied to convert P.S. 156 to a conversion charter school. Tr. 30 [Levin].<sup>1</sup> Pursuant to the Charter Schools Act, an application for a conversion charter school within the NYC DOE, may only be submitted to one charter entity - the Chancellor of the NYC DOE. *See* Education Law § 2851(3)(c). Because Levin’s application sought to convert P.S. 156 to a charter school, the law required the Chancellor to hold a vote among the parents of the students who were enrolled at the school that Levin sought to convert. Tr. 115 [Levin]; *see also* Education Law § 2851(3)(c).<sup>2</sup> A majority of the parents of students attending P.S. 156 voted in favor of the conversion. Tr. 115 [Levin]. As a result, in accordance with the state law, Levin and the Chancellor of the NYC DOE then entered into a charter agreement. ER-1 [KIPP Charter Application] at A-213-16. After review and approval of the charter agreement, on May 4, 2000, the New York State Board of Regents granted KIPP a charter to operate as a conversion charter school within the NYC DOE. *See* ER-5 [KIPP Charter].

### **The NYC DOE’s Relationship with KIPP**

Unlike in “independent, standalone” charter schools such as the charter school in *Hyde Leadership*, when KIPP was established as a conversion charter school, the student population at P.S. 156 automatically transferred to KIPP. Tr. 111 [Levin]. Pursuant to

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<sup>1</sup> Citations are to the record of the hearing held before Board Agent Jacob Frisch. Citations to the transcript of the hearing are referred to as “Tr. at \_\_\_ [Witness].” Citations to joint exhibits accepted into evidence at the hearing are referred to as “J-\_\_\_ [Exhibit Name].” Citations to Union exhibits are referred to as “U-\_\_\_ [Exhibit Name].” Citations to Employer exhibits are referred to as “ER-\_\_\_ [Exhibit Name].”

<sup>2</sup> Non-conversion charter schools are not required to hold such a vote.

the Charter Schools Act, the NYC DOE is required to provide funding to KIPP in the form of tuition “for each student enrolled in the charter school who resides in the district.” *See* Education Law § 2856(1)(a); Tr. 555 [Johnson]. The NYC DOE also provides space to KIPP, which shares space in a public school building with a NYC DOE traditional public school. Tr. 144 [Padgett].

Further, because KIPP is a conversion charter school within the NYC DOE, the Chancellor is responsible for ensuring that KIPP complies with all applicable laws, regulations and charter provisions. The Charter Schools Act specifically provides the NYC DOE with the authority to visit, examine into, and inspect the charter school. *See* Education Law § 2853(2-a). The Chancellor of the NYC DOE is one of the public agents required to “supervise and oversee” KIPP. *See* Education Law § 2853(1)(c). As a result, KIPP is required to remit certain records to the NYC DOE, including financial statements, board meeting minutes, and academic outcomes for students. Tr. 553-54 [Johnson]. The NYC DOE also conducts site visits to KIPP to observe KIPP teachers. *Id.* If KIPP fails to comply with its charter provisions, or the law, the Chancellor of the NYC DOE may terminate KIPP’s charter and close the school. *See* Education Law § 2855.

### **The UFT’s Relationship with KIPP**

Employees of a converted charter school “shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit . . . .” Education Law § 2854(3)(b). The NYC DOE and the UFT are parties to a collective bargaining agreement



(“CBA”) governing terms and conditions of employment of teachers working for the NYC DOE. Upon conversion, KIPP’s entire staff was comprised of employees who had previously been employed by NYC DOE at P.S. 156. *See* ER-1 [KIPP Charter Application] A-320. After KIPP converted, the UFT maintained representation of KIPP teachers in the same bargaining unit as NYC DOE teachers, and KIPP continued to collect and remit union dues to the UFT.

Also in accordance with the Charter Schools Act, and unlike for non-conversion charter schools established in New York City, KIPP provides its teachers with the same health, dental, vision, and welfare benefits as the NYC DOE provides to UFT represented teachers. Tr. 96, 123-34 [Levin]. Additionally, like NYC DOE teachers, KIPP teachers are also members of the New York City Teachers Retirement System (“NYC TRS”). Tr. 95 [Levin], 137 [Padgett], 348, 363 [Procida]. This retirement benefit has been provided by KIPP to teachers since KIPP converted to a charter school. *See* ER-1 [KIPP Charter Application] at A-320.

In 2012, the New York State Public Employment Relations Board (“PERB”) determined that KIPP was a conversion charter school and that KIPP teachers were represented by the UFT in the same bargaining unit as NYC DOE teachers. *See Matter of Corcoran (KIPP Academy Charter School*, 45 PERB ¶ 3013 (2012). In that proceeding, PERB rejected KIPP’s argument that it was not a conversion charter school under the Charter Schools Act. *See id.* Instead, PERB determined that it was bound by the prior findings of the New York State Board of Regents, the New York State Education Department, and the Chancellor of the NYC DOE which determined that KIPP had been an existing public school eligible to convert to a charter school pursuant to

Education Law § 2851(3)(c). *See id.* PERB also found that KIPP teachers are subject to the CBA. *See id.* (finding that “the Legislature intended that employees of a converted charter school as a matter of law, employees of a converted charter school are in the applicable district-wide negotiating unit, if any, and subject to the existing agreement for that unit”). KIPP did not challenge PERB’s determination that the UFT represented KIPP teachers and continued to collect and remit union dues to the UFT.

Since PERB’s 2012 determination, KIPP has recognized the UFT as the bargaining representative of KIPP teachers and, unlike at non-conversion charter schools, KIPP has applied substantial provisions of the UFT/NYC DOE collective bargaining agreement. As discussed above, KIPP teachers receive the same health, vision, dental, and other welfare benefits as provided to NYC DOE teachers. Tr. 96-97 [Levin], 280 [Procida]. Further, the base salary for teachers at KIPP complies with the CBA (Tr. 104 [Levin]) and, KIPP paid its teachers the same retroactive payments that NYC DOE teachers received in accordance with the CBA. Tr. 162 [Alvarez], 520 [Saraiya]; *see also* U-2 [November 29, 2015 email from Williams to KIPP employees].

## **PROCEDURAL HISTORY**

On January 17, 2017, the UFT filed an unfair labor practice charge Case No. 02-CA-191370, based on KIPP’s illegal conduct in circulating a decertification petition amongst UFT represented teachers. *See* Decision at 1 n. 2. On January 25, 2017, Nicole Mangiere and Christopher Diaz filed the instant decertification petition. On January 31, 2017, after taking evidence of KIPP’s illegal conduct concerning the decertification petition, the Board stayed the processing of the decertification petition for 18 months. *See* Decision at 1 n.2. Thereafter, the Board processed the decertification petition and a

hearing was held in the matter on May 21, 2018, May 22, 2018, and May 29, 2018. Neither petitioner testified at the hearing, nor did they attend the hearing.

On August 24, 2018, Regional Director John J. Walsh issued the Decision. In the Decision, the Regional Director found that although KIPP is unequivocally a conversion charter school under New York law, KIPP is nonetheless an employer within the meaning of Section 2(2) of the Act pursuant to the Board's decision in *Hyde Leadership*, 364 NLRB No. 88. *See* Decision at 7 n. 14, 9. Further, the Regional Director refused to decline jurisdiction over KIPP, finding incorrectly that (1) he was bound by the Board's decision in *Hyde Leadership* to assert jurisdiction and (2) asserting jurisdiction would not disturb the nearly 20 year collective bargaining relationship at the school. As the Regional Director improperly applied *Hyde Leadership* to KIPP and improperly asserted jurisdiction over KIPP, the UFT submits the instant Request for Review of the Decision.

## **ARGUMENT**

### **I. The Regional Director Misapplied the Board's Decision in *Hyde Leadership* and Erred in Asserting Jurisdiction Over KIPP.**

The record in the representation hearing establishes that KIPP is a conversion charter school and, but for its existence first as a traditional public school operated by the NYC DOE, KIPP could not exist today. These facts distinguish KIPP from non-conversion charter schools in New York, and squarely demonstrate that KIPP is a political subdivision, exempt from the Board's jurisdiction under *Hawkins County*, 402 U.S. 600 (1971). Instead of reaching this conclusion, the Regional Director misapplied the Board's decision in *Hyde Leadership*, and erred in asserting jurisdiction over KIPP.

The Charter Schools Act permits a charter school to be established as conversion charter school or a non-conversion charter school. To establish a non-conversion charter

school an applicant may submit an application to one of three “charter entities.” *See* Education Law § 2851(3). If the charter entity approves the application, it enters into a charter agreement with the individual seeking to establish the charter school, which is ultimately submitted to the Board of Regents for approval and incorporation of the charter school as an education corporation. *See* Education Law § 2852(5); § 2853(1)(a). This is how the charter school in *Hyde Leadership* was established. *See Hyde Leadership*, 364 NLRB No. 88 (2016) (finding that both the individual applicant’s and founding board of trustees involvement in the creation of the non-conversion charter school demonstrates that it was not “created by the state” and therefore not a political subdivision).

Unlike non-conversion charter schools, conversion charter schools exist first as traditional public schools operated by the local school district. *See* Education Law § 2851(3)(c). Also unlike non-conversion charter schools, the charter entity for a conversion charter school must be the local school district, here the NYC DOE Chancellor. *See* Education Law § 2851(3)(c). Upon receiving an application to convert one of the NYC DOE public schools into a charter school, the Chancellor must hold a vote among the parents of the students who are enrolled at the public school. *See* Education Law § 2851(3)(c). This requirement is also specific to conversion charter schools. Further, when the public school converts to a charter school, the staff and the student population automatically transfer to the conversion charter school. Tr. 111 [Levin]; ER-1 [KIPP Charter Application] A-320. Notwithstanding these legal differences, the Regional Director determined that “the founding of [KIPP] . . . was, in all

material respects, identical to the founding of the school analyzed in *Hyde Leadership* . . . .” Decision at 7.

The test for determining whether an employer is a political subdivision of the state is set forth in the Supreme Court’s decision in *Hawkins County*. See *Hawkins County*, 402 U.S. 600. An entity is a political subdivision if it is “either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” *Id.* at 604-05. As a conversion charter school, KIPP satisfies the first prong of this test and is therefore a political subdivision exempt from Board jurisdiction.

An essential element in establishing a conversion charter school is the existence of a public school that seeks to convert to a charter school. See Education Law § 2851(3)(c). Undoubtedly, the NYC DOE and the public schools it operates are political subdivisions of New York. See *The Children’s Village, Inc.*, 197 NLRB No. 135 (1972). Accordingly, in converting from a public school to a charter school, KIPP was “created by the state” under the unambiguous language of *Hawkins County*. KIPP could not exist today but for the conversion of an *existing public school* of the NYC DOE.

While David Levin may have been the individual applicant to establish KIPP as a charter school, he could not have done so without the public entity that first existed as part of the NYC DOE within P.S. 156. Otherwise, Levin conceded in his testimony, he would have had to apply to establish KIPP as a non-conversion charter school. Tr. 41 [Levin]. In light of the fundamental differences in the manner in which conversion charter schools and non-conversion charter schools are established, the Regional Director

erred in finding that KIPP's creation was "identical" to the creation of the non-conversion charter school in *Hyde Leadership*.

The record below also establishes that KIPP was created to "constitute a department or administrative arm of the government." *Hawkins County*, 402 U.S. 604-05. After the public school converted, KIPP continued to provide a free public education to the same public school students with the same educational staff. Tr. 111 [Levin]; ER-1 [KIPP Charter Application] A-320. KIPP is publicly funded and is co-located with another NYC DOE public school. *See* Education Law § 2856(1)(a); Tr. 555 [Johnson], Tr. 144 [Padgett]. Given that KIPP was created by the state, these additional facts demonstrate that KIPP was created to constitute an administrative arm of the government. KIPP therefore is a political subdivision and the Board does not have jurisdiction in this matter.

## **II. The Board Should Decline to Assert Jurisdiction over Conversion Charter Schools, including KIPP.**

The Board has the discretion to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction." *See* 29 U.S.C. § 164(c)(1). As former Board Chair Miscimarra noted in his dissent in *Hyde Leadership*, jurisdiction over Hyde, a New York charter school, would "have an insubstantial effect on interstate commerce." *See* 346 N.L.R.B. No. 88 (2016) at 9-10 (Miscimarra in dissent). The same is true here, and the Board should decline jurisdiction over conversion charter schools established in New York, which, like Hyde, have an insubstantial effect on interstate commerce.

In determining whether to decline jurisdiction under Act, the NLRB often takes into account a number of factors, including state regulation of labor relations for the industry at issue. *See Yonkers Raceway, Inc.*, 196 NLRB 1202 (1972); *Meadow Stud, Inc.*, 130 NLRB 373 (1961); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959). Further, the Second Circuit has upheld the NLRB’s discretion to decline jurisdiction on grounds that also include the “unique and special relationship” between the states and the industry. *See New York Racing Ass’n v. NLRB*, 708 F.2d 46 (2d Cir. 1983). In New York, the Charter Schools Act heavily regulates the labor relations of conversion charter schools, and, prior to the Board’s decision in *Hyde Leadership*, New York State’s Public Employees’ Fair Employment Act also regulated the labor relations of conversion charter school as public employers. *See Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB ¶ 3013 (2012).

Former Board Chair Miscimarra also noted in his dissent in *Hyde Leadership* that by declining jurisdiction, “the Board would permit state and local governments to regulate charter school labor relations” 346 N.L.R.B. No. 88 at 10, which is exactly what the New York legislature did in the Charter Schools Act. While the Regional Director found that the unit created by state law (*i.e.*, a unit of all classroom teachers employed by NYC DOE and teachers employed by KIPP, *see* Education Law § 2854.3(b))<sup>3</sup> was “by definition inappropriate” under the Act, the unit created by state law is, by definition, appropriate under state law.

Further, conversion charter schools clearly share a “unique and special relationship” with New York and the NYC DOE. KIPP exists because the Chancellor agreed, pursuant to New York State law, to enter into a charter agreement for KIPP to

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<sup>3</sup> Nothing in the Act explicitly prevents such a unit.

convert a traditional public school into a charter school. In doing so, KIPP not only benefitted from a much quicker establishment process, but additionally benefitted by keeping its student population and retaining its experienced teaching staff who were all veteran teachers of the NYC DOE and represented by the UFT. Tr. 41, 99 [Levin].

In exchange, KIPP agreed to comply with the charter agreement it entered into with the NYC DOE and to operate in accordance with the Charter Schools Act. Accordingly, KIPP is subject to strict oversight by the NYC DOE. *See* Education Law § 2853(2) (“[t]he . . . charter entity shall oversee each school approved by such entity, and may visit, examine into and inspect any charter school, including the records of such school, under its oversight”); *see also* Tr. 553-54 [Johnson] (testifying that NYC DOE employees observe KIPP teachers and that KIPP remits records to the DOE concerning financial statements, board meeting minutes, and academic outcomes for students).

Prior to the NLRB’s decision in *Hyde Leadership*, PERB asserted jurisdiction over all charter schools in New York and, among other things, processed certification petitions and improper practice charges filed involving charter schools. Following the Board’s decision in *Hyde Leadership*, PERB deferred to the Board and refused to process certification petitions or improper practice charges filed in connection with any charter school, notwithstanding that the Board did not substantively address the jurisdictional status of conversion charter school employees.

The Regional Director incorrectly surmised that if he declined to assert jurisdiction in this instance, “KIPP Academy’s employees would be left in a jurisdictional limbo” and effectively be denied their rights under the Act. Decision at 20. There is no support in the record or the case law to suggest that PERB would not



similarly defer to the Board's decision in this matter should the Board decide to decline jurisdiction over conversion charter schools and begin to process improper practice charges filed involving conversion charter schools, thus preventing the "jurisdictional limbo" envisioned by the Regional Director.

Further, the Charter Schools Act unequivocally intends for employees of conversion charter schools to maintain their union representation, their bargaining unit composition, and their benefits under the applicable collective bargaining agreement upon the public school's conversion to a charter school. *See* Education Law § 2854(3)(b); *see also Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB ¶ 3013 (2012) (finding that "the Legislature intended that employees of a converted charter school as a matter of law, are in the applicable district-wide negotiating unit, if any, and subject to the existing agreement for that unit").

KIPP teachers have for nearly twenty years enjoyed the benefits provided by the CBA for the unit which state law created. KIPP teachers receive the same medical and welfare benefits pursuant to the CBA and have received these benefits since the KIPP converted. Tr. 96, 123-24 [Levin]. KIPP teachers' base salary is calculated in accordance with the CBA. Tr. 104 [Levin]. Additionally, KIPP paid its teachers retroactive salary payments in accordance with the CBA. *See* U-2 [November 29, 2015 email from Williams to KIPP teachers].

The UFT represents KIPP teachers as part of the same bargaining unit of teachers employed by the NYC DOE. KIPP acknowledged that its teachers would remain part of the NYC DOE bargaining unit of teachers when applying to become a conversion charter school and KIPP has continued to recognize the UFT's representation throughout its

operation as a conversion charter school. Indeed, as former Board Chair Miscimarra noted in his dissenting opinion in *Hyde Leadership*, 364 NLRB No. 88, one of the Board's primary roles is to foster "stability of labor relations." The Decision destabilizes the long-standing bargaining relationship that KIPP, KIPP teachers, and the UFT have benefitted from under the Charter Schools Act. The Decision also serves to destabilize not just the long-standing bargaining relationship between the UFT and KIPP, but between all conversion charter schools and the unions that represent the conversion charter employees. Accordingly, even if the Board determines it has jurisdiction over KIPP, the Board should exercise its discretion and decline to assert jurisdiction over conversion charters schools established in New York.

## **CONCLUSION**

For all of the forgoing reasons, the UFT respectfully requests that the Board grant the Request for Review.

Dated: New York, New York  
September 21, 2018

Respectfully submitted,

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